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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Case No. 77-582

ORIGINAL COPY

CARL E. OSBORNE, JR.

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO
BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

Case No. 77-5828

CARL E. OSBORNE, JR.,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

OPINION BELOW

The opinion below is reported at State v. Osborne 50 Ohio St. 2d 211 (1977), and is correctly set forth in the appendix to the petition.

JURISDICTION

Jurisdiction is invoked by petitioner pursuant to Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE RULE OF DOYLE V. OHIO 96 S CT. 2240 (1976) IS VIOLATED WHEN PROSECUTION CROSS-EXAMINES FOR PURPOSES OF IMPEACHMENT, A CRIMINAL DEFENDANT, WHO TESTIFIES IN HIS OWN BEHALF, RELATIVE TO PRIOR STATEMENTS OR MATERIAL OMISSIONS FROM SUCH PRIOR STATEMENTS WHERE THE DEFENDANT DID NOT ASSERT HIS RIGHT TO SILENCE, BUT RATHER, DID IN FACT MAKE STATEMENTS TO POLICE OFFICERS AND THOSE STATEMENTS AND MATERIAL OMISSIONS FROM SUCH STATEMENTS ARE INCONSISTENT WITH TRIAL TESTIMONY?

2. WHETHER THE EVIDENTIARY REQUIREMENTS OF LAYING THE FOUNDATION FOR IMPEACHMENT OF A DEFENDANT-WITNESS OR REFRESHING RECOLLECTION, WHICH NECESSARILY INVOLVE EXTRAJUDICIAL STATEMENTS BY THE DEFENDANT AND OTHERS IN THE QUESTION ITSELF, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS?

3. DOES THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

4. WHETHER THE EVIDENCE WAS SUFFICIENT TO PROVE THE AGGRAVATING CIRCUMSTANCE, BEYOND A REASONABLE DOUBT, PERMITTING THE IMPOSITION OF CAPITAL PUNISHMENT?

5. WHETHER PETITIONER WAS AFFORDED A FAIR AND IMPARTIAL TRIAL BY JURY GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

Petitioner was indicted by the Franklin County Grand Jury on two counts of aggravated murder, section 2905.01, Revised Code. The grand jury further specified that the offenses of aggravated murder were committed with prior calculation and design and during a kidnapping, Section 2929.04(A)(7), Revised Code, and that the offense was committed for hire, Section 2929.04(A)(2), Revised Code.

The testimony and other evidence presented to the jury revealed the following facts.

The victim, Hermalee Ross, who was employed at the Ontario Food Store on Morse Road, Columbus, Ohio, left for work at approximately 7:35 a.m. on Sunday, December 15, 1974. Mrs. Ross was scheduled to work at 8:00 a.m. The victim and her husband lived in Hillard, Ohio.

Robert Brock, an employee at the same store, testified that on the morning of December 15, 1974, he arrived at work at approximately 6:45 a.m. He further testified that between 8:30 and 8:45 a.m., he went back out to the parking lot and observed the victim's car parked next to his vehicle.

Brock observed a red spot on his car, and similar red spots on the ground and on a tire. Brock testified that the victim did not appear for work that day, and the spots were not there when he arrived.

Officer Larry Bartholow, Columbus Police Department Mobile Crime Laboratory, took photographs of the scene and recovered the victim's earring, two pieces of metal and a match book.

Lois Berg testified that she went to the laundry near the Ontario store at about 8:00 a.m. that morning and while there, observed a light-skinned black male wearing blue jeans, a blue jeans jacket and a dark blue bandana with white print on his head. Miss Berg identified State's Exhibit 27 (a bandana seized from co-defendant Weind's home) as being the scarf or bandana she saw. The man went to a "bluish-green" car parked in the parking lot where she observed "some kind of commotion"; the man entered the passenger side of the car and the car was driven away. Miss Berg identified a photograph of the petitioner's sister's car as the one she saw.

Dorothy Hale testified that she lived at 11380 Vans Valley Road in Delaware County, Ohio; that approximately 8:30 a.m. on the morning of December 15, she saw a car drive up to an abandoned school house near her home; that two men got out, looked around, went back to the car, took a woman from the car and "led her" to the school house. Mrs. Hale called her son, Wayne (who noted that the time was 8:40 a.m. by his digital clock) and then observed the two men come out of the school house alone. A photograph of petitioner's sister's car was identified as looking like the car the witness observed.

Wayne Hale testified to the same basic facts and that after the two men left, he went to the school house and found a woman's body. The witness also identified photographs of the petitioner's sister's car as the car he saw that morning.

Joseph Willis, a former employee of petitioner's mother identified the murder weapon, Exhibit 20, a Raven .25 caliber automatic pistol as one he had purchased and later given to petitioner's mother. The parties stipulated that one James Young, licensed firearms dealer from Newark, Ohio, would testify that he sold the weapon to Joseph Willis on September 7, 1973.

Davina Prince testified that she found the victim's purse containing $100 by the automobile of Lee Brock, at approximately 8:20 a.m. on December 15, 1974.

The parties stipulated testimony of Detective Tom Jones; that Jones was called by an attorney for one Michael Goins; that Jones and Goins met, had discussions regarding the Ross homicide and as a result, Goins led police to a specific location in Alum Creek, within Columbus, Ohio, where police recovered the murder weapon.

The parties stipulated that Detective Tom Strausbaugh would testify that he and Detective Robert Cupp executed a search warrant authorizing a search of co-defendant Weind's house and seized a pair of denim clogs, the head scarf, denim jacket and trousers; all of which were turned over to the police crime laboratory. Further, that search warrants were executed at the home of the petitioner seizing a pair of denim trousers and the automobile of petitioner's sister was seized.

Further stipulations were entered into by the parties; that six .25 caliber shell casings (Exhibit 35D) were found at the scene of the murder; that expended bullets were recovered from beneath the floor boards of the school house and from within the floor boards. Blood samples from the victim was Type "A" blood as were the blood spots found in the Ontario store parking lot and on the chrome strip of the petitioner's sister's car. Type "A" blood stains were also found on the back part of the right front seat of the car. Human blood was found on co-defendant Weind's denim clog shoe.

By stipulation, it was agreed that the bullets found at the murder scene and in particular, those removed from the victim's head, were fired by Exhibit 20, the Raven .25 caliber automatic. The coroner's testimony was stipulated. Death was caused by gunshot wounds to the back of the neck. In addition, the autopsy disclosed repeated blunt trauma to the head with a metallic object.

Further stipulations disclosed that if Steve Lucas of Eastland Shell gasoline service station were to testify, he would state that he knew the Osborne family members; that on December 16, 1974, petitioner's mother, James Weind and petitioner appeared at his station in the petitioner's sister's car; that at Mrs. Osborne's request, he replaced all

four tires on the car; that the bill was paid in cash; that he suggested using one of the tires as a spare as the spare was a bald tire with a puncture repair but that all four tires were taken by Weind and placed in the trunk.

The victim's husband testified that he had previously employed petitioner's mother and petitioner; that he had had an affair with petitioner's mother over a five-year period of time but had told her that "she was out" some four to six weeks before the murder.

Brenda and Debbie Zweydorff, friends of petitioner's sister, testified that on the evening of December 14, 1974, and early morning of December 15, 1974, they were at a party at the home of petitioner's sister (also the home of petitioner and petitioner's mother). Co-defendant Weind was present wearing denim clothes and a bandana. Petitioner and Weind took the keys to the sister's car and left returning later with beer. Later the girls went out and when they returned at approximately 4:30 a.m., the petitioner, his mother and Weind were talking together. Debbie Zweydorff testified that she stayed overnight at the Osborne home, going to bed at 5:15 a.m. on December 15, 1974. She was awakened at approximately 6:00 a.m. by petitioner entering the bedroom and telling his sister, Kay Osborne, that he and Weind were going to take her car again and go to breakfast.

Miss Zweydorff arose at 8:00 a.m. and at approximately 10:00 to 10:15 a.m., ". . . the front door flew open. It banged back real hard and Carl came running in." Weind was with him. Petitioner asked his mother to come outside. The three then came back inside, obtained scrub buckets, brushes, water and went outside. Approximately one half hour later, the three returned to the house and began leafing through the telephone book. Several calls were made. Thereafter, the three left with the car: "They said they were going to get it cleaned."

James Westlake, petitioner's uncle and an inmate at Chillicothe Correctional Institute, testified that on December 23, 1974, petitioner and his mother visited him; that petitioner showed him a newsclipping

of the murder and then described the killing. He stated that petitioner said he and James Weind had killed Mrs. Ross with his mother's gun; that he had called Mrs. Ross over to the car; that Weind hit her over the head with a gun which broke; that they took her to the school house ". . . and that's where he said he killed her."

Westlake told the petitioner to contact his lawyer and when petitioner said he did not want to, Westlake suggested he could go to Williamsport, Pennsylvania and gave petitioner a name and address in that town.

Petitioner told Westlake that ". . . they tried to clean it up . . ." (the car) and they"[c]hanged the tires on it." When Westlake asked about the murder, petitioner stated he felt no remorse, that ". . . it was like driving two nails in a board."

Westlake, thereafter, related this information to an agent of the Federal Bureau of Investigation and to Columbus Homicide Detective Ron Price. Detective Price testified regarding locating the murder weapon and transporting petitioner back from Williamsport, Pennsylvania.

Edward Michael Goins, after being granted "use" immunity pursuant to Section 2945.44, Revised Code, testified that he knew both petitioner and co-defendant Weind; that he recognized the murder weapon (Exhibit 20).

Goins further testified that he recognized State's Exhibit 37, a .380 automatic pistol, as the type of gun he sold to Jimmy Weind in the early morning hours of a Sunday in December, 1974. Goins testified that petitioner and Weind arrived at his apartment that morning. Goins could observe petitioner seated in the car. Weind came inside and purchased the gun telling Goins that ". . . Carl had had a gun what his mother had gave him, a .25 automatic. And they had to go to Hilliard, Ohio." Weind further said ". . . it might have to be some killin' involved."

Charles Tinon testified that in March, 1975, he was housed in the same cell in the county jail with petitioner and one Paul Brumfield. Tinon was awakened by conversation between petitioner and Brumfield.

Tinon testified to the conversation.

> "Well, the parts of the conversation I heard was that Carl was talking to Paul and said that, 'We took her to the house there in Delaware. We made her stay on the floor and we kicked her around a bit.' And then they talked low where I couldn't hear them and they asked --- Carl asked for a cigarette and Paul gave him one, and Carl was laughing and Paul asked him what was so funny and he said that, 'She laughed right before I shot her.' --- I mean, 'She asked for a cigarette right before I shot her,' And he was laughing when he said it . . . . He said 'I can tell you now because you've been found crazy and nobody'd believe you if you told them.'"

The parties stipulated testimony of metallurgy experts from Battellee Memorial Institute; that the .380 automatic (Exhibit 37) was examined and compared to the metallic fragments found at the parking lot and based upon spectroscopic analysis, the metals were of the same origin. Exhibits 1 through 50 were admitted without objection.

Petitioner offered several witnesses to show bias on the part of Goins, Tinon and Westlake. Ernest Watts testified that he attended the party at Kay Osborne's and both Zweydorff girls were drunk.

The petitioner testified in his own behalf. During direct examination, the petitioner denied leaving his home at all that night, said he was ill, and testified that Weind and his mother were responsible for the murder. The petitioner testified that Westlake lied and that Tinon lied. The petitioner admitted fleeing the state.

On cross-examination, petitioner testified that although he possessed knowledge of the real facts of the case, petitioner admitted he lied to police and to his sister and never disclosed his story to anyone until he told his current attorneys.

The petitioner was convicted of kidnapping, (Section 2905.01, Revised Code) aggravated murder (Section 2903.01[A], Revised Code) with the specification that the offense was for hire, and of aggravated murder (Section 2903.01[B], Revised Code) with the same specification.

The judgment, conviction, and sentence was affirmed by the Franklin County Court of Appeals, Tenth Appellate District and by the Ohio Supreme Court.

Petitioner now seeks a writ of certiorari to the Ohio Supreme Court.

REASONS FOR DENYING THE WRIT

1. THE RULE OF DOYLE V. OHIO 96 S. CT. 2240 (1976) IS A SHIELD, NOT A SWORD, AND WHERE A SUSPECT DOES NOT STAND MUTE WHEN QUESTIONED BY POLICE OFFICERS OR ASSERT HIS RIGHT TO SILENCE, BUT RATHER, DOES, IN FACT, GIVE STATEMENTS AND ANSWERS QUESTIONS CONCERNING AN OFFENSE, HE MAY BE CROSS-EXAMINED UPON MATERIAL OMISSIONS FROM THOSE STATEMENTS AND INCONSISTENCIES WITH TRIAL TESTIMONY WHERE DEFENSE COUNSEL DOES NOT OBJECT.

The issue herein is whether cross-examination of petitioner relative to prior statements, inconsistencies, and omissions from prior statements violated the rule of Doyle v. Ohio 96 S. Ct. 2240 (1976).

At the outset the state would note that the defendant did not object in the trial court to the cross-examination complained about herein. Under Ohio law such is a waiver, Criminal Rule 52, State v. Lancaster 25 Ohio St. 2d 83 (1971), and the merits should not be considered in this court. Henry v. Mississippi 379 U.S. 443 (1965).

On Saturday, December 20, 1974, petitioner went to the police headquarters and talked to detectives about the Ross homicide. This is the first statement at issue. At this time, petitioner was not in custody or under arrest for this offense. The record does not show whether petitioner was advised of his Miranda rights or his right to silence. However, the record reflects that at this time the petitioner did not assert his right to silence, but rather, did in fact make various statements to the detectives, which included a statement that he had not seen James Weind, petitioner's co-defendant, in one and one-half to two weeks prior to the day of the statement and that such contact was at a store.

This statement was directly contradictory to, and totally inconsistent with, petitioner's trial testimony where he stated he saw Weind late Saturday or early Sunday morning, the day of the murder about 10:00 a.m. and Tuesday, December 17, 1974.

After this initial inconsistency was developed, petitioner was aksed if in these initial statements to police he had told them his mother was home all night and whether he had discussed a .25 automatic pistol which was the type of weapon used in the murder. Petitioner responded by stating he did not recall but stated that he did not deny making such statements. This tact in answering questions precluded prosecution rebuttal evidence of such prior inconsistent statements since petitioner did not "deny" them, he just "didn't recall."

In this initial statement to police, the petitioner did not state that he knew where the tires were; where the murder weapon was and that Weind and his mother had allegedly admitted the murder to him. These material omissions from the initial statement given by petitioner to the police were elicited on cross-examination. Thus, the record shows that the petitioner did not assert the right to silence in this initial contact with the police, but instead gave a statement to police concerning various facts of the case, but omitted, and contradicted, the facts testified to at trial.

The second statement concerns the trip back to Columbus from Williamsport, Pennsylvania after petitioner's arrest. It is clear that petitioner did <u>not</u> assert his right to silence, but rather, in petitioner's own words, "We talked all the way back."

As stated in <u>Vitali</u> v. <u>United States</u>, 383 F. 2d 121, 123 (1st Cir. 1967):

> "A defendant cannot have it both ways. If he talks, what he says <u>or omits</u> is to be judged on its merits or demerits and not on some artificial standard that only the part that helps him can be later referred to."
> (Emphasis added.)

Herein, the petitioner did not stand mute, did not assert his right to silence, or exercise his Fifth Amendment right. On the contrary, he gave a statement and answered questions as indicated by the facts stated above.

In these statements, there were inconsistencies and material omissions when compared to trial testimony.

Beyond peradventure, the inconsistencies were admissible, such as the discrepancy about contact with co-defendant Weind.

The fact that statements, answers, responses, and conversations by petitioner occurred is not insoluby ambigous and, contrary to silence in such a situation, does have strong probative value when subsequent testimony shows material omissions from the prior statements. In that instance, the omissions call for an inference of recent fabrication and are admissible.

For those reasons Respondent submits that the cross-examination was proper.

Finally, the error if any was harmless under Chapman v. California 386 U.S. 18 (1967) for if the jury believed the testimony of James Westlake, which they obviously did, the defendant would be found guilty and such claimed error reasonably did not affect the outcome.

2. THE EVIDENTIARY REQUIREMENTS OF LAYING THE FOUNDATION FOR IMPEACHMENT BY PRIOR INCONSISTENT STATEMENTS AND PERMITTING REFRESHING THE RECOLLECTION OF WITNESSES DO NOT VIOLATE ANY FEDERAL CONSTITUTIONAL RIGHT.

At common law and by court decision impeachment by prior inconsistent statement requires laying a proper foundation in the question on cross-examination with respect to time, place, parties and the statement or conversation itself.

This is the rule in Ohio and has been adopted in Rule 608(B) of the Federal Rules of Evidence, such directing the witness' attention to the prior conversation to allow denial, affirmance, or explanation.

The question itself necessarily involves extrajudicial statements by the defendant-witness or others participating in the conversation.

This evidentiary rule violates no federal constitutional right.

In addition to impeachment this cross-examination would be proper to refresh the recollection of the defendant-witness insofar as he answered "I don't remember" or "I don't recall" more than twenty-five times, such with the knowledge that the prior statements had been recorded.

It is the State's position on that issue that where the defendant takes the stand in a criminal case he is subject to cross-examination the same as any other witness and if the witness is repeatedly evasive throughout such examination, he may be cross-examined as to specific content of a conversation between such defendant and a third party to refresh his memory, such is an exception to the hearsay rule, and he is not denied confrontation.

For such reasons the writ should be denied.

3. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENTS, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Introduction

Respondent, State of Ohio, respectfully submits that the statutory provisions, and procedure, for the imposition of capital punishment in Ohio are consistent with the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution.

As separately discussed below, the death penalty in Ohio, as applicable to premeditated and felony-murder, when specified aggravating circumstances are present and no mitigating circumstances exist, is not so grossly disporportionate to the offense.

Nor is the penalty wantonly and freakishly imposed, in an arbitrary or capricious manner, so as to run afoul of the Eighth Amendment or violate the dictates of Furman v. Georgia 408 U.S. 238 (1972).

Specific guidelines, in the name of aggravating and mitigating circumstances, provide the necessary control on discretion, focusing on the offense and the offender.

As a constitutionally indispensable part of the process of inflicting the death penalty in the state of Ohio the circumstances, character, and record of both the offense and the offender are considered in conformity with this court's decisions last term in Gregg v. Georgia 428 U.S. 153 (1976), Proffitt v. Florida 428 U.S. 242 (1976) Jurek v. Texas 428 U.S. 262 (1976), Woodson v. North Carolina 428 U.S. 280 (1976), and Stanislaus Roberts v. Louisiana 428 U.S. 325 (1976).

Once convicted, a death penalty defendant has an appeal as of right under the Constitution of the State of Ohic to both an intermediate appellate court and the Ohio Supreme Court. The explicit nature of the specifications of aggravating circumstances and mitigating circumstances allows effective judicial review to assure that the penalty is imposed fairly and not arbitrarily.

For these reasons, fully set forth below, the Respondent submits that the framework for the imposition of capital punishment in the State of Ohio is constitutional.

1. The Crime

In the State of Ohio the only crime for which capital punishment may be imposed is Aggravated Murder (Section 2903.01 O.R.C.). The crime in analogous to what was formerly called First Degree Murder in Ohio (Section 2901.01, 1953 O.R.C.), and other states.

That statute provides:

> "Sec. 2903.01 (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the revised code."

The relevant culpable mental state of "purposely" is defined in Section 2901.22(A) O.R.C. as follows:

> "Sec. 2901.22(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature,"

The death penalty may be imposed only for purposeful, planned murders and for purposeful killings during the course of designated felonies.

Unless the existence of an aggravating circumstance listed in Section 2929.04(A) O.R.C. is alleged in the indictment, the penalty for Aggravated Murder is life imprisonment. See Section 2929.03(A) and 2941.14(B) O.R.C.

2. Aggravating Circumstances

One, or more, of the seven aggravating circumstances listed in Section 2929.04(A) O.R.C. must be alleged in the indictment and proven beyond a reasonable doubt or the death penalty is precluded. See Section 2914.41(B) O.R.C.

The aggravating circumstances are as follows:

> "(1) The offense was the assassination of the President of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or, of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
> (2) The offense was committed for hire.
> (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
> (4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of

the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another, committed prior to the offense at bar, or, the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary."

Two of the aggravating circumstances deal with the status of the victim as a public official or a law enforcement officer. However, the status of the victim alone does not permit imposition of the death penalty, as did the statute considered in Harry Roberts v. Louisiana ___ U.S. ___, 20 U.S.L.W. 3983, 21 Cr. L. 3076 (rendered June 6, 1977).

The remaining five aggravating circumstances consider the nature, status, character, or record of both the offender and the offense committed.

In addition to the verdict as to the substantive offense of aggravated murder, the verdict must include separate findings as to the specification of aggravating circumstances. A guilty verdict for the crime, but not guilty as to the specified aggravating circumstance, results in a life sentence.

3. Procedure after conviction for the crime of aggravated murder and a finding of guilty as to an aggravating circumstance

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding Judge at a jury trial, or the three judge panel if jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida ___ U.S. ___, 20 Cr. L. 3083, Section 2929.03(B) O.R.C. requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides.

> "(B) Report
>
> The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

This report of the history, character, and record of the individual offender along with the circumstances of the particular offense is submitted to the sentencing authority.

A mitigation hearing is held to consider those reports, testimony, other evidence, and arguments on the subject of penalty which should be imposed. The offender may make a statement to the court, which need not be under oath, and such is subject to cross-examination only if the statement is made under oath. See Section 2929.03(B) O.R.C.

The judge, or three judge panel if applicable, then considers all relevant information as it related to the existence of one or more of the three mitigating circumstances set forth in Section 2929.04(B) O.R.C.

If a mitigating circumstance is shown to exist by a preponderance of the evidence the penalty is life imprisonment. If no mitigating

circumstance is found to exist by a preponderance the death penalty is imposed. Section 2929.03(E) O.R.C.

4. Mitigating Circumstances

Section 2929.04(B) O.R.C. sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence of the evidence:
> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficienty, though such condition is insufficient to establish the defense of insanity."

As noted previously, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character and condition of the offender and the offense.

In State v. Bayless 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976), the first case upholding the Ohio death penalty statute, the court noted that this statute on mitigation and the mitigating factors, as with any legislation, may require judicial interpretation and clarification. Bayless, supra, at 86. The court further noted that these mitigating factors were to be strictly construed, in favor of the defendant, to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods 48 Ohio St. 2d 127, 358 N.E. 2d 1059 (1976), the second branch of the syllabus, which is the

law of the case, see Cassidy v. Glossip 12 Ohio St. 2d 17, 24, 231 N.E. 2d 64 (1967), set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under section 2929.04(B)(2) O.R.C. The court held that this circumstance was to be construed more broadly than the defense or duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced, supra, at 135, and the nature and circumstances of the offense, the history, character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Supra at 137, citing Williams v. New York 337 U.S. 241 (1949).

Likewise, in State v. Black, 48 Ohio St. 2d 262, 358 N.E. 2d 551 (1976), in constuing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state or capacity. The second branch of that syllabus elaborated by stating that the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not specifically defined, or was too narrow, the court stated that broadly defined and however evidenced any mental state or incapacity may be considered in light of all the circumstances. Supra at 268.

In State v. Bell 48 Ohio St. 2d 270, 358 N.E. 2d 556 (1976), in the second branch of the syllabus, the court held that the age of the offender and prior criminal record are relevant factors to be considered in determining the existence of mitigating circumstances under section 2929.04(B)(2) and (3) O.R.C. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency, both minority and senility being relevant. Supra at 282.

Thus it may be seen that all relevant information is, or may be, presented to the sentencing authority which by statute, and construction of the mitigating circumstances, then determines whether society's

best interests are served by exacting the ultimate penalty. This decision is based on the circumstances of the particular offense and particular offender.

This procedure complies with the Eighth Amendment and the dictates of this court's decisions last term, with the Ohio procedure closely analagous to the procedure upheld in Proffitt, supra, and Jurek, supra.

5. Appellate Review

The court of common pleas, in each of Ohio's eighty-eight counties, is the court with general and subject matter jurisdiction in Aggravated Murder cases for which the death penalty may be imposed.

A court of appeals, with geographical jurisdiction of one or more counties, reviews criminal convictions, judgments, and sentences from the court of common pleas. A defendant upon whom the death penalty has been imposed has an appeal as a matter of right to the court of appeals. Article IV, section 3, Ohio Constitution. If a timely notice of appeal is not filed a defendant may seek review as a delayed appeal under Rule 5, Ohio Rules of Appellate Procedure.

A death penalty defendant has an appeal as a matter of right to the Ohio Suprme Court, where the conviction and sentence in a capital case has been affirmed by the Court of Appeals. Article IV, section 2(B)(2)(a)(ii), Ohio Constitution.

An aggrieved defendant in a capital case, as a matter of right, may have his conviction reviewed by the Court of Appeals and the Ohio Supreme Court.

In State v. Bayless, 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976) the Ohio Supreme Court noted its duties and responsibility in reviewing a capital case, supra, at 86:

> "[T]his court has a particular opportunity and responsibility to assure that death sentence, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the

> aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges."

Respondent would note that the explicit guidelines contained in the statutory framework for capital punishment facilitates this type of review.

As was noted in State v. Miller 49 Ohio St. 2d 198, 361 N.E. 2d 419 (1977) at 204:

> "This statewide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty."

Based on the foregoing, Respondent submits that appellate review in the state of Ohio will assure fairness and even imposition of the capital penalty.

6. Conclusion

For each of the foregoing reasons, breifly stated, the Respondent, State of Ohio, respectfully submits that the imposition of capital punishment, and the statutory procedure, do not run afoul of the Eighth Amendment, and the writ should be denied.

4. THE PROSECUTION MUST PROVE A SPECIFICATION OF AGGRAVATION BEYOND A REASONABLE DOUBT BEFORE THE DEATH PENALTY MAY BE IMPOSED AND THE EVIDENCE HEREIN WAS SUFFICIENT ON THAT ISSUE

As noted previously section 2929.04(A)(2) O.R.C. requires the state to prove the aggravating circumstance beyond a reasonable doubt for the death penalty to be imposed.

Both direct and circumstantial evidence are admissible to prove a specification.

The doctrine of complicity or aiding and abetting is also applicable in proof of a specification.

On such basis the evidence introduced in the trial court, if believed, was sufficient for the jury to find beyond a reasonable doubt that the murder was for hire.

For that reason the writ should be denied.

5. THE VOIR DIRE OF PROSPECTIVE JURORS DISCLOSES THAT PETITIONER WAS AFFORDED A FAIR AND IMPARTIAL TRIAL AS REQUIRED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It is the State's position that where the voir dire of prospective jurors discloses that a criminal defendant can retrieve a fair and impartial trial in the county where the offense was committed the trial court is not in error in denying a motion for change of venue.

Initially, the state would note that petitioner contends there was a violation of a court order relative to inclusion of the petitioner's name on the summons to prospective jurors. While there was discussion by the court and both counsel as to drawing a new venire and the preference for not having the petitioner's name on the summons, in the court's oral order, there was no statement indicating that the summons not bear the style of the case. Nor is a written court order or entry to that effect contained in the record.

The 256 typewritten transcript of the voir dire of prospective jurors establishes that those jurors who served on the case had not formed or expressed an opinion as to petitioner's guilt, stated they could be fair and impartial, and would decide the case based on the evidence presented in court.

It was proper for the trial court to overrule the motion for change of venue prior to the voir dire of the jury. State v. Swiger 5 Ohio St. 2d 151 (1966), State v. Johnson 31 Ohio St. 2d 106 (1972).

Newspaper clippings alone did not warrant a change of venue.

The totality of the circumstances show no inherent prejudice in the trial setting, or procedure, or actual prejudice from the jury selection process. See Murphy v. Florida 421 U.S. 794 (1975), and for such reason the writ should be denied.

CONCLUSION

For each of the foregoing reasons the Respondent, State of Ohio,

respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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